

FILED

MAY 17 2012

[Signature]
CLERK

01V12-4092

UNITED STATES DISTRICT COURT District of South Dakota

Name of Movant Prisoner No. Case No.
Guillermo Ortiz, Movant #10757-173 10-cr-40047-JBJ-01

Place of Confinement
FCI-MEDIUM, Post Office Box 4050, Pollock, Louisiana 71467

UNITED STATES OF AMERICA V. GUILLERMO ORTIZ, A/K/A "MEMO"

MOTION

1. Name and location of court which entered the judgment of conviction under attack The United States District Court, Southern Division of South Dakota, 400 South Phillips Avenue, Room 128, Sioux Falls, SD. 57104-6851

2. Date of judgment of conviction May 4, 2010

3. Length of sentence 188 months

4. Nature of offense involved (all counts) Conspiracy to distribute 500 grams or more of methamphetamine.

5. What was your plea? (Check one)

(a) Not guilty
(b) Guilty
(c) Nolo contendere

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:
Not Applicable

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

(a) Jury
(b) Judge only

7. Did you testify at the trial?

Yes No

8. Did you appeal from the judgment of conviction?

Yes No

9. If you did appeal, answer the following:

(a) Name of court Eighth Circuit Court of Appeals

(b) Result Ruling of District Court Affirmed

(c) Date of result January 27, 2012

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?

Yes No

11. If your answer to 10 was "yes", give the following information:

(a)(1) Name of court NOT APPLICABLE

(2) Nature of proceedings NOT APPLICABLE

(3) Grounds raised NOT APPLICABLE

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes No N/A

(5) Result NOT APPLICABLE

(6) Date of result NOT APPLICABLE

(b) As to any second petition, application or motion give the same information:

(1) Name of court NOT APPLICABLE

(2) Name of proceeding NOT APPLICABLE

(3) Grounds raised NOT APPLICABLE

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes No **N/A**

(5) Result NOT APPLICABLE

(6) Date of result NOT APPLICABLE

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes No **N/A**

(2) Second petition, etc. Yes No **N/A**

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

Not Applicable

12. State concisely every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds, which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts the motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.

- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: **COUNSEL WAS INEFFECTIVE FOR NOT ARGUING THE WHARTON RULE.**

Supporting FACTS (state *briefly* without citing cases or law): **A conspiracy cannot be established on the action of two people when possession with intent requires there be a possessor with a potential buyer of the controlled substance.**

B. Ground two: **COUNSEL WAS INEFFECTIVE FOR NOT SHOWING THE DIFFERENCE BETWEEN "CONSPIRACY TO POSSESS" AND "CONSPIRACY TO POSSESS WITH INTENT TO DISTRIBUTE" A CONTROLLED SUBSTANCE.**

Supporting FACTS (state *briefly* without citing cases or law): **There was clear evidence that Ortiz used a controlled substance and that he often supported that use through buyer/seller relationships with others. Because it is clear that all the parties involved before in the 2005 issues were users' it becomes difficult to understand a conspiracy to possess with an intent to distribute when evidence shows the possession was for use.**

C. Ground three: **THE COURT GAVE THE JURY AN INAPPROPRIATE ANTI-DEADLOCK CHARGE WHEN IT INSTRUCTED THE JURY IT COULD ONLY ACQUIT OR FIND GUILT IF IT SPLIT ON ISSUES REGARDING MULTIPLE, OR SEPARATE CONSPIRACIES**

Supporting FACTS (state briefly without citing cases or law): **The court allowed the jury to decide the conspiracy based on various conspiracy and non-conspiracy issues that may have led to the jury basing its finding of guilt on non-conspiracy issues or the wrong conspiracy because the jury could find either conspiracy would support a conviction.**

D. Ground four: **COUNSEL WAS INEFFECTIVE FOR NOT ARGUING THAT THE "INTENT" WAS NOT SHOWN REGARDING PETITIONER'S "POSSESSION" OF THE CONTROLLED SUBSTANCE.**

Supporting FACTS (state *briefly* without citing cases or law): There was never any evidence that the movant possession of the controlled substance was for any purpose other than consumption of the substance and evidence showed that the movant and others often traded among themselves the controlled substance they often got together and shared.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them: All of the above issues were not presented on direct review for reasons unknown to movant as counsel was the sole presenter of the issues presented on Direct.

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes No

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Clint Sargent, 315 South Phillips Avenue, Sioux Falls,
South Dakota 57104

(b) At arraignment and plea Clint Sargent, 315 South Phillips Avenue,
Sioux Falls, South Dakota 57104

(c) At Trial Clint Sargent, 315 South Phillips Avenue, Sioux Falls,
South Dakota 57104

(d) At sentencing Clint Sargent, 315 South Phillips Avenue,
Sioux Falls, South Dakota, 57104

(e) On appeal Same as Above

(f) In any post-conviction proceeding Same as Above

(g) On appeal from any adverse ruling in a post-conviction proceeding Same as above, ... Clint Sargent
315 South Phillips Avenue, Sioux Falls, South Dakota 57104

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes No

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes No

(a) If so, give name and location of court which imposed sentence to be served in the future: NOT APPLICABLE

(b) Give date and length of the above sentence: NOT APPLICABLE

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes No N/A

Wherefore, movant prays that the court grant him all relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

5-14-13
(date)

Guillermo Ortiz
Signature of Movant

ADDITIONAL GROUNDS:

E. Ground five: **COUNSEL WAS INEFFECTIVE FOR NOT ARGUING FOR A BUYER/SELLER JURY INSTRUCTION**

Supporting FACTS (state briefly without citing cases or law): The was clear evidence that the sales was between people who were consumers of controlled substance and not for profit but for supporting drug usage. As such, the sales more likely related to buyer/seller issues and not conspiracy agreements as suggested by the government.

F. Ground Six: **SCIENTIFIC PROOF THAT THE SUBSTANCE ALLEGED AT TRIAL WAS A CONTROLLED SUBSTANCE TRIGGERING THE PROVISION OF THE STATUTE WAS NEVER PRESENTED TO THE JURY TO SUPPORT THE JURORS FINDING OF GUILT**

Supporting FACTS (state *briefly* without citing cases or law): There was never any evidence that the alleged substance was scientifically proven to be a controlled substance to support the finding of guilt by the jury. The government never presented a chemist to support there conclusion that Ortiz was in possession of an actual controlled substance.
